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The Senate of
The State of Texas

1D# 13755
MJ

Committee
JOINT INTERGOVERNMENTAL RELATIONS
Chairman
ECONOMIC DEVELOPMENT
STATE AFFAIRS
ADMINISTRATION
SPECIAL SUBCOMMITTEE ON
CONGRESSIONAL DISTRICTS

September 27, 1991

The Honorable Dan Morales
Attorney General
Supreme Court Building
P. O. Box 12548
Austin, Texas 78711

RQ-206

RECEIVED

SEP 30 91

Opinion Committee

Dear General Morales:

This is to request an Attorney General Opinion regarding the relationship between SB 2 and HB 7 of the 2nd Called Special Session. There is disagreement regarding an administrative proceeding currently pending before the Texas Department of Health as to whether the Texas Water Commission or the Texas Department of Health has jurisdiction to hear the proceedings. The subject matter is an application for a license to dispose of radioactive material. As proposed, SB 2 appears to immediately transfer the license application procedures to the Texas Water Commission. On the other hand, HB 7, which was enacted and came into effect sometime after SB 2, appears to retain all hearing procedures with the Texas Department of Health.

I ask for an Attorney General's Opinion to be issued resolving this matter for the immediate needs of the application in connection with proposed License No. L04336. The question presented is as follows:

"Is the hearing procedure for pending applications to license radioactive disposal sites retained with the Texas Department of Health, or is such now transferred to the Texas Water Commission if the application was pending on the effective date of SB 2?"

Enclosed please find a memorandum with related comments. Please contact me if you require additional information.

Sincerely,

A handwritten signature in dark ink, appearing to read "John Whitmire".

JOHN WHITMIRE

JW/dnl

ACCOMPANIED BY ENCLOSURES —
FILED SEPARATELY

Enclosure

**MEMORANDUM REGARDING THE NEED FOR AN
ATTORNEY GENERAL'S OPINION
ON THE TRANSFER OF RESPONSIBILITY OVER RADIOACTIVE WASTES
FROM THE TEXAS DEPARTMENT OF HEALTH TO THE TEXAS WATER COMMISSION**

SUMMARY

During the first special session of the 72nd Legislative Session, the Legislature passed two bills related to the regulatory authority over the disposal of radioactive materials. Senate Bill 2 and House Bill 7 both transfer this authority from the Texas Department of Health to the Texas Water Commission. SB 2 made the transfer effective immediately upon the signature of the Governor (August 12 1991). HB 7 made the transfer effective March 1, 1992.

While HB 7 was the later passed bill, SB 2 involves a more specific and detailed expression of the Legislature's intent. The issue is, therefore, which act determines the transfer date.

SUMMARY OF SB 2 AND HB 7

Prior to the Summer of 1991, Chapter 401 of the Texas Health and Safety Code, together with Sections 361.15 and 361.18 (relating to hazardous waste) made it very clear that, unless the radioactive waste materials included "hazardous" constituents, the Texas Department of Health (TDH) had the exclusive jurisdiction and responsibility to regulate any disposal practices for the materials.

SB 2 was passed in late July, 1991 by the Texas Legislature to reorganize the environmental agencies in the state. This act creates a Texas Natural Resources Conservation Commission (TNRCC) beginning September 1, 1993. Over the next few years, most of the jurisdiction of TDH over environmental issues and all of the jurisdiction of the Texas Air Control Board (TACB) will be consolidated with that of the TWC into the TNRCC. Until September 1, 1993, any authority transferred to the TNRCC will be managed by TWC.

Section 1.050 (part of Article 1 of SB 2) amends Chapter 401, Health and Safety Code, by adding a new Subchapter K. This subchapter transfers all regulatory and licensing jurisdiction over the disposal of radioactive substances to TWC. (A copy of Section 1.050 is attached as Exhibit 1.)

Section 1.088 of SB 2 establishes the effective date for the transfers of most of the environmental programs of TDH to TWC as of March 1, 1992. It specifically lists all transferred programs except that dealing with disposal of radioactive materials. Section 1.088 is attached as Exhibit 2.)

As originally drafted and as approved by the House Environmental Affairs Committee, disposal of radioactive materials was included in Section 1.088. (This version of Section 1.088 is attached as Exhibit 3.) Representative Saunders, the House sponsor of SB 2, however, offered an amendment on the House floor that removed the disposal of radioactive materials from Section 1.088. (See Exhibit 4.) The amendment was adopted.

With the March 1, 1992 date no longer the effective date for the transfer, other sections of the bill must be examined. Section 1.063 of SB 2 states, "This Article (Article 1) takes effect on the earliest date allowed under Article III, Section 39, of the Texas Constitution." (Section 1.063 is attached as Exhibit 5.) The Constitution allows immediate effect of laws that state that they shall be effective immediately and that pass with at least 2/3s vote of each House.

SB 2 passed with 2/3s vote of each House and, therefore, became effective on August 12th when signed by the Governor. August 12th is, therefore, the date of the transfer of the authority over the disposal of radioactive materials to TWC.

House Bill 7 then creates the complication. It was passed on August 9, 1991, but was not signed until the end of August. HB 7 relates to the reorganization of the Texas Department of Health, and it picked up the transfer language from SB 2. The amendment that was made in SB 2 for the immediate effective date for the transfer of jurisdiction over the disposal of radioactive materials was not, however, made in HB 7. Thus, Section 1.09 of HB 7 states that the environmental programs of TDH, including that program involving the disposal of radioactive material, transfer on March 1, 1992. (See Exhibit 6.)

ANALYSIS

Senate Bill 2 was in effect upon the signing by the Governor on August 12, 1991. At that time, TDH's authority over the disposal of radioactive materials legally transferred to TWC. The issue is, therefore, what is the affect of SB 7, which did not become law until the end of August.

Under the general rule, the specific legislation controls over the general legislation, and, therefore, SB 2 would appear to determine the effective date. SB 2 is clearly the more specific act relating to the authority over the disposal of radioactive materials. Further, the House floor amendment is a very specific action that clearly indicates that the Legislature intended to make the transfer effective immediately.

In addition, since the transfer had already occurred when HB 7 became law, HB 7 should be read as surplusage. There was nothing to transfer from TDH to TWC when HB 7 became effective.

The Code Construction Act provides some additional guidance. Section 311.023 gives general rules for a court to follow. Basically, a court should try to construe the laws consistent with what makes sense.

Section 311.025 also provides guidance when two laws are "irreconcilable." This Section first directs an attempt to harmonize any conflicts. If that is not possible, the latest bill to be enacted prevails.

The present case is not one where there is a conflict, much less an irreconcilable conflict. The Legislature did not transfer TDH's authority to TWC in one Bill and to another agency in another bill. The bills do the same thing; the only question is timing. The bills can be reconciled since the goal of the transfer in HB 7 is accomplished with the transfer on or before March 1, 1992.

Further, Section 311.003 of the Code Construction Act states that the Act is to be used to clarify "common situations." A common situation under Section 311.025 would be where two bills were passed, both becoming effective on September 1st of the year of passage of the bills. The later passed by both houses might then need to control any irreconcilable conflicts. The present case is not a common situation.

In the present case, the specific act of the House floor amendment to SB 2 is the clearest indication of the Legislature's intent. HB 7 did not involve any debate on the transfer to the TWC. That act carried along the language of the original SB 2. The Legislature simply forgot to change HB 7 in the crush of the Special Session.

CONCLUSION

SB 2 determines the effective date of the transfer of authority over the disposal of radioactive materials. The transfer from TDH to TWC occurred on August 12, 1991.